No. 12498

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Receiver of the Estate of SALSBURY MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

PETITION FOR REHEARING.

GENDEL & RASKOFF,
810 Oviatt Building, Los Angeles 14,
Attorneys for George T. Goggin, Receiver of the Estate of Salsbury Motors, Inc., Debtor.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

No. 12498

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Receiver of the Estate of SALSBURY MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

PETITION FOR REHEARING.

To: The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Your petitioner herein, George T. Goggin (hereinafter referred to as "Receiver") as receiver in bankruptcy of the estate of Salsbury Motors, Inc., and appellant herein, respectfully petitions this Honorable Court for a rehearing of the judgment of this Court rendered herein on January 5, 1951, with a written opinion by Judge Orr after a hearing before Judges Stephens, Bone and Orr.

Introduction.

Except for the issue as to the effect of the prior appeal (hereinafter referred to as "banker's lien appeal"), the opinion of this Court filed on January 5, 1951, resolved all of the issues involved in this appeal in favor of appellant. Although it was conceded by the appellee that neither the pleadings nor the evidence in the banker's lien proceeding raised any issue as to the subordination of the Bank's

claim to the claims of other creditors, this Court construed the last paragraph of the banker's lien order as having decided the subordination question, and therefore ruled that the bankruptcy court lost jurisdiction to act on the receiver's subordination petition. This, we respectfully urge, constituted an unreasonable and erroneous interpretation of the banker's lien order and an unwarranted restriction upon the jurisdiction of the bankruptcy court.

Grounds for Petition.

The ruling of this Court as to the effect of the banker's lien appeal on the jurisdiction of the bankruptcy court to entertain the receiver's petition for subordination of the Bank's claim should be reconsidered upon the following grounds:

1. The banker's lien order did not involve any issue or the consideration of any evidence as to subordination of the Bank's claim and, therefore, could not have determined any such issue.

2. Even if the banker's lien order is construed by this Court as determining the order of payment of dividends on the Bank's claim, the petition for subordination should be considered as a petition for reconsideration of the order of allowance under Section 57(k) of the Bankruptcy Act.

3. The banker's lien appeal was from an interlocutory order in a proceeding in bankruptcy and, therefore, its pendency did not divest the bankruptcy court of jurisdiction to act on the question of subordination of the Bank's claim.

4. If the banker's lien appeal is deemed to have divested the bankruptcy court of jurisdiction to act on a petition for subordination, this Court should, by its mandate, direct the bankruptcy court to hear and determine the receiver's amended petition.

I.

The Banker's Lien Order Did Not Involve Any Issue or the Consideration of Any Evidence as to Subordination of the Bank's Claim and, Therefore, Could Not Have Determined Any Such Issue.

In its opinion herein this Court has gone no further than the order in the banker's lien appeal in determining that it disposed of the subordination question. This, we submit, was improper. The Supreme Court of the United States has held that in construing the scope and effect of any judgment where the plea of *res judicata* or estoppel by judgment is involved, the Court must resort to the pleadings and the evidence presented in the earlier proceedings to determine whether or not the issues raised by the more recent litigation were in fact determined in the earlier litigation, notwithstanding the fact that the earlier judgment might contain language seemingly disposing of the issues raised in the more recent litigation.

It is conceded by the Bank, as indeed it must, that "the grounds for subordination here urged by counsel for the receiver were not raised by him at the time he objected to the Bank's claim . . ." (App. Br. p. 7.) A thorough and painstaking examination of the record in the banker's lien appeal, including both opinions of this Court, will not reveal a single pleading, statement, reference or intimation that presented a question as to whether or not payment of dividends on the Bank's claim should be subordinated to the claims of other creditors on equitable grounds. That record shows without any question that the sole matter decided was whether or not the Bank had properly exercised its banker's lien under Section 3054 of the Civil Code of the State of California in seizing certain commercial paper belonging to the debtor and applying the pro-

ceeds therefrom against the indebtedness of the debtor to the Bank, thereby reducing the Bank's claim asserted in the Chapter XI proceeding. The receiver attempted to obtain an order from the bankruptcy court directing the Bank to return to the receiver either the commercial paper seized or the proceeds therefrom which might have been collected by the Bank. The ruling against the receiver in that case has now become final.

In the instant proceeding, however, the cause of action was based upon allegations that the Bank had induced other creditors to extend credit to the debtor by knowingly giving false information concerning the debtor's financial condition. Despite the total dissimilarity in the nature of the two causes of action and the legal and factual issues involved, this Court has taken the last sentence of the banker's lien order as having determined the subordination cause of action.

The only reason this sentence appeared in the order was because the Bank had yet to liquidate certain real property held as security under a trust deed and the uncertainty of the amount of recovery led to the language in the last sentence; there was no dispute as to this issue.

A controlling decision of the Supreme Court demonstrates that the banker's lien order cannot be construed as *res judicata*. The case of *Vicksburg v. Henson* (1913), 231 U. S. 259, presented a situation strikingly similar to that of the instant case. In that case the City of Vicksburg had granted a franchise to a corporation to furnish the city with water for a term of thirty years. Fourteen years later the city attempted to derogate from the franchise by undertaking to build, and thereafter to operate, a waterworks system of its own. The corporation that had been given the franchise filed suit against

the city to enjoin the infringement on its franchise and was successful in obtaining an injunction. The city was thereby enjoined from issuing bonds for the purpose of constructing its water system and from actually constructing the water system "during the period prescribed in said ordinance, contract and franchise." Thus, the order clearly and unequivocally enjoined the city from issuing bonds for constructing a water system for the balance of the full thirty-year period of the franchise. The city appealed in that case but the decree was affirmed by the Court of Appeals and by the Supreme Court of the United States and the injunction containing the above quoted language as to its duration became final. Thereafter, four years prior to the termination of the thirty-year franchise, the city undertook by proper resolution and election to authorize a sale of bonds for the construction of a waterworks plans which was not to be operated until after the expiration of the franchise. Whereupon, the representative of the corporation holding the franchise brought suit to enjoin the bond issue and the construction of the waterworks on the ground that the issue as to the issuance of the bonds and the construction of the water system at any time during the thirty-year franchise was *res judicata* under the decree granted against the city in the former action. The District Court of the United States in which the action was filed granted the injunction, which was affirmed on appeal to the Court of Appeals for the Fifth Circuit. This ruling was reversed on appeal to the Supreme Court, notwithstanding the fact that the literal wording of the decree in the earlier case had, by its terms, disposed of the question. The Supreme Court reasoned that the decree in the earlier case could not be given the binding effect given it by the District Court and the Circuit Court because a consideration of the plead-

ings, the issues and the evidence in the earlier case showed that it was not intended to have that effect nor to dispose of the current issues. The Court pointed out that the purpose of the earlier decree was merely to protect the thirty-year franchise. The fact that the city intended to take action during the term of the franchise to prepare itself to operate its own water system immediately upon expiration of the thirty-year franchise could not be held to interfere with the franchise so long as the new water system was not operated prior to its termination. The Supreme Court took the realistic view that it would take some time for the city to erect its waterworks system and, notwithstanding the contrary language in the earlier decree, held that it could be done. The Court stated (231 U. S. at 268):

> "Coming to the question whether the former decree disposed of the rights of the parties, as was held in the court below, which judgment was affirmed by the Circuit Court of Appeals, it is undoubtedly true that a right, question or fact put in issue and decided by a court of competent jurisdiction must be taken as settling the rights of the parties in respect to such controversy and while it remains undisturbed is conclusive between them. The enforcement of this rule has been repeatedly said to be essential to secure the peace and repose of society and in order that an end may be made of controversies between parties who have once invoked and have had the determination by a competent judicial tribunal of the matters in dispute between them. It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided and

the rights of the contending parties thereby concluded. We think that an examination of the record in the former case, put in evidence in this case, does not support the contention that the matter here in issue was then adjudicated and determined. It is true there is some broad language in the decree."

"It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. *Graham v. Railroad Company,* 3 Wall. 704, 710; *Reynolds v. Stockton,* 140 U. S. 254; *Vicksburg v. Vicksburg Water Works Co.,* 206 U. S. 496, 507; *Haskell v. Kansas Natural Gas Co.,* 224 U. S. 217, 223. In *Barnes v. Chicago, M. & St. P. Ry. Co.,* 122 U. S. 1, this court, speaking by Mr. Chief Justice Waite, said (p. 14):

" 'Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham v. Railroad Company,* 3 Wall. 704. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota Company was restrained and enjoined from asserting title as against them.'

"The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues

made and intended to be submitted and what the decree was really designed to accomplish. We cannot agree with the court below or with the majority of the Circuit Court of Appeals that the effect of the former adjudication was to preclude the rights of the parties in the present controversy."

See also

Radford v. Myers (1914), 231 U. S. 725.

The Supreme Court in the case of *Reynolds v. Stockton* (1891), 140 U. S. 254, approved and adopted the statement of principles of the New Jersey Court of Errors and Appeals in the case of *Munday v. Vail,* 34 N. J. Law 418. The Supreme Court stated (140 U. S. at 269):

". . . We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes.*"

The quotation from the opinion referred to by the Supreme Court is as follows (140 U. S. at 268):

". . . A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial

decision arises. And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: "A matter alleged that is neither traversable nor material shall not estop." Co. Litt. 352b. And in a note to the *Duchess of Kingston's Case,* in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments "are conclusive as to nothing which might not have been in question, or were not material." For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon "the property according to the rights that appear" upon the record, I refer to the authority of Lord Redesdale. *Giffard v. Hort,* 1 Sch. & Lef. 386, 408. See also *Gore v. Stacpoole,* 1 Dow, 18, 30; *Colclough v. Sterum,* 3 Bligh, 181, 186.' Reference is made in the opinion to the case of *Corwithe v. Griffing,* 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, "as the jurisdiction was confined to the subject-matter set forth and described in the petition." In this case the court had juris-

> diction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.' "

The *Vicksburg* and *Reynolds* cases, we think, require a reconsideration of the ruling in the instant case in the light of the principles there announced. The banker's lien order could not and did not decide the question of subordination. As heretofore pointed out, this was the fundamental basis of the decision of the Supreme Court in the leading bankruptcy case on equitable subordination, to-wit, *Pepper v. Litton* (1939), 308 U. S. 295. There, it will be recalled, the Supreme Court ruled that the bankruptcy court had jurisdiction to subordinate a claim in bankruptcy by reason of the misconduct of the claimant in acquiring the claim, notwithstanding the fact that the claim was based upon a final and binding judgment of a state court, which judgment had been collaterally attacked without success both by the bankrupt and by the trustee. The Supreme Court stated:

> ". . . On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles."

And so, in the instant case, neither on the pleadings nor in the evidence was there presented any question in the banker's lien proceeding of whether or not payment of dividends on the Bank's claim might be subordinated to the claims of other creditors upon equitable principles. This distinguishes our case from *Diamond Laundry Corp. v. California Employment Stabilization Commission* (9th Cir., 1947), 162 F. 2d 398. In that case the very issues

which were before this Court on appeal were sought to be relitigated at the same time before the bankruptcy court. In the instant case, however, the issues in the two proceedings were not only not identical but wholly without similarity.

II.

Even if the Banker's Lien Order Is Construed by This Court as Determining the Order of Payment of Dividends on the Bank's Claim, the Petition for Subordination Should Be Considered as a Petition for Reconsideration of the Order of Allowance Under Section 57k of the Bankruptcy Act.

Section 57k of the Bankruptcy Act provides:

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

It is not without significance that this was the section relied upon by the Supreme Court in *Pepper v. Litton* as empowering courts of bankruptcy to subordinate the claims of one creditor to claims of others, notwithstanding the fact that the claim is recognized and allowed as a binding legal obligation. Moreover, the Supreme Court made it clear that the right to subordinate thus authorized is in no way impaired by the fact that there has been previous litigation concerning the validity of the claim, with a final binding judgment that it is a valid claim. Of course, it must necessarily be true that there must be a point where the litigation comes to an end. That point was reached in *Heiser v. Woodruff* (1946), 327 U. S. 726. There the Court pointed out that unlike *Pepper v. Litton,* the issue of fraud on which the trustee in *Heiser v. Woodruff* relied in support of his petition to sub-

> diction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.' "

The *Vicksburg* and *Reynolds* cases, we think, require a reconsideration of the ruling in the instant case in the light of the principles there announced. The banker's lien order could not and did not decide the question of subordination. As heretofore pointed out, this was the fundamental basis of the decision of the Supreme Court in the leading bankruptcy case on equitable subordination, to-wit, *Pepper v. Litton* (1939), 308 U. S. 295. There, it will be recalled, the Supreme Court ruled that the bankruptcy court had jurisdiction to subordinate a claim in bankruptcy by reason of the misconduct of the claimant in acquiring the claim, notwithstanding the fact that the claim was based upon a final and binding judgment of a state court, which judgment had been collaterally attacked without success both by the bankrupt and by the trustee. The Supreme Court stated:

> ". . . On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles."

And so, in the instant case, neither on the pleadings nor in the evidence was there presented any question in the banker's lien proceeding of whether or not payment of dividends on the Bank's claim might be subordinated to the claims of other creditors upon equitable principles. This distinguishes our case from *Diamond Laundry Corp. v. California Employment Stabilization Commission* (9th Cir., 1947), 162 F. 2d 398. In that case the very issues

which were before this Court on appeal were sought to be relitigated at the same time before the bankruptcy court. In the instant case, however, the issues in the two proceedings were not only not identical but wholly without similarity.

II.

Even if the Banker's Lien Order Is Construed by This Court as Determining the Order of Payment of Dividends on the Bank's Claim, the Petition for Subordination Should Be Considered as a Petition for Reconsideration of the Order of Allowance Under Section 57k of the Bankruptcy Act.

Section 57k of the Bankruptcy Act provides:

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

It is not without significance that this was the section relied upon by the Supreme Court in *Pepper v. Litton* as empowering courts of bankruptcy to subordinate the claims of one creditor to claims of others, notwithstanding the fact that the claim is recognized and allowed as a binding legal obligation. Moreover, the Supreme Court made it clear that the right to subordinate thus authorized is in no way impaired by the fact that there has been previous litigation concerning the validity of the claim, with a final binding judgment that it is a valid claim. Of course, it must necessarily be true that there must be a point where the litigation comes to an end. That point was reached in *Heiser v. Woodruff* (1946), 327 U. S. 726. There the Court pointed out that unlike *Pepper v. Litton,* the issue of fraud on which the trustee in *Heiser v. Woodruff* relied in support of his petition to sub-

ordinate the claim, had actually been raised, tried and disposed of adversely in the non-bankruptcy court that had rendered the judgment upon which the claim in bankruptcy was grounded. This then became *res judicata* and beyond the power of the bankruptcy court to redetermine.

This brings us to a consideration of the record in the banker's lien proceeding to determine whether or not the language in the order pertaining to the payment of dividends could have constituted a determination of any issues presented to the Court for decision in the subordination proceeding. Clearly, it did not.

Professor Collier recognizes Section 57k as a restriction upon the doctrine of *res judicata* which is made necessary by the peculiar nature of a bankruptcy proceeding; he states:

> "No procedural system can dispense with some measure of derogation from the rigid rules of *res judicata* where manifest injustice has been done due to some inadvertance, clerical error, gross factual mistake, or the like. The Federal Rules of Civil Procedure provide for such relief within the limits of Rules 59 and 60. Bankruptcy proceedings, where time is of the essence, are fraught with dangers of errors and inaccuracies, due to the multiplicity of interested but frequently ill-informed parties, as well as to the comparatively late stage at which a common trustee replaces the individual claimants. The general power of the bankruptcy court within certain limitations to correct its own mistakes or reconsider matters already disposed of, or, as it is called, the right to rehear its orders, *sua sponte* or upon motion of a party in interest, cannot now be seriously controverted. With respect to the bankruptcy court's

> power to reconsider orders of *allowance* and *disallowance* of claims, the Act is more specific." (3 Collier on Bankruptcy, 14th Ed., 302.)

Professor Collier then goes on to refer to Section 57 (k) of the Bankruptcy Act as giving bankruptcy courts the authority to reconsider allowed claims at any time prior to the closing of the estate. He also directs attention to the numerous cases holding that the time limitations of Rules 59 and 60 of the Federal Rules pertaining to new trials and relief from judgments and orders do not apply to bankruptcy proceedings. Two such recent cases are *Indemnity Insurance Co. v. Reisley* (2nd Cir. 1946) 153 F. 2d 296, and *Bailey v. Proctor* (1st Cir., 1948) 166 F. 2d 392.

The Court of Appeals for the Second Circuit applies similar reasoning in the *Matter of Jayrose Millinery Co., Inc.* (1937), 93 F. 2d 471, 35 A. B. R. (N. S.) 354, by stating:

> ". . . The purpose of this section is to protect the estate against claims which have been erroneously allowed; not to protect the creditor against partial disallowance. He needs no such protection. If he is aggrieved by the referee's order of allowance, he may petition for review by the District Court and, if necessary, appeal from the court's order. But the remedy by review and appeal would not be adequate protection for the estate. Claims are usually allowed before the trustee or other creditors have had any opportunity to get sufficient information to oppose them or to determine whether the allowance is correct. Subsequent investigation may show the allowance was wrong in whole or in part, and section 57 (k) provides the procedure for correcting it."

The instant case demonstrates the wisdom of the Congressional policy behind Section 57(k). We have here a receiver taking over the assets of a debtor which are estimated to be in excess of $2,000,000.00 [Tr. 18] for the benefit of creditors in excess of $2,700,000.00 [Tr. 16]. It would not be humanly possible within any fixed period of time for a bankruptcy administrator to acquire sufficient information with respect to such a vast and complicated business to enable him to assert all of the facts, objections, or defenses that might exist with respect to any claim or to assert reasons that it should be subordinated. By reason of the nature of the proceedings he might not come into possession of facts as to the fraudulent conduct of a claimant until many months or even years after a claim has been allowed. Hence Congress has provided that the only time limitation is the pendency of the bankruptcy proceedings and under Section 57(k) an allowed claim may be reconsidered at any time prior to the closing of the estate. As a matter of fact, Section 57(1) expressly gives jurisdiction to the bankruptcy court to entertain a proceeding by a trustee to recover dividends already paid after reconsideration and rejection of a claim in whole or in part. (See 3 Collier on Bankruptcy (14th Ed.) 314, and *Boyum v. Johnson* (8th Cir., 1942), 127 F. 2d 491, 49 A. B. R. (N. S.) 228.)

There is another obvious reason why a bankruptcy administrator might not be interested in attempting to subordinate a claim being asserted in the bankruptcy by a person against whom the trustee or receiver is attempting to

recover assets for the estate. Surely, this Court judicially knows that in the greatest number of bankruptcy proceedings no dividends are available for general creditors. Aside from the many cases where there are no assets at all being administered by the bankruptcy court, there are many cases where the assets that are being administered are completely consumed by prior claims, such as tax and labor claims and expenses of administration. Until the trustee or receiver, as the case may be, has collected all of the assets belonging to the estate and has determined and paid the priority claims, he is ordinarily in no position to know whether or not dividends will be available for the general creditors. For this reason such an administrator might be properly criticized for spending money of the estate in litigating a question of subordination when in fact the question may be academic because nothing will be available for the general creditors in any event. It, therefore, follows that it is neither unusual nor improper for a receiver to first attempt to recover some assets for the bankruptcy estate and, subsequently, when it appears that dividends will be available, to attempt to subordinate a claim to the claims of other creditors if facts come to his attention warranting such relief. This might well have been one of the considerations leading to the inclusion of Section 57(k) in the Bankruptcy Act because it expressly refers to the reallowance or rejection of claims previously allowed "in whole or in part *according to the equities of the case*" at any time before the estate is closed.

III.

The Banker's Lien Appeal Was From an Interlocutory Order in a Proceeding in Bankruptcy and, Therefore, Its Pendency Did Not Divest the Bankruptcy Court of Jurisdiction to Act on the Question of Subordination of the Bank's Claim.

A reading of the banker's lien order which is quoted in its entirety at the end of this Court's opinion herein shows that there was no amount fixed as the unsecured portion of the Bank's claim. Rather, the order provided that the total claim of the Bank was in a certain sum from which there should be deducted the items on which the Bank had exercised its lien and subject to further credit of the following amounts: (1) the proceeds from the sale of the real property on which the Bank held a deed of trust, and (2) the proceeds from the collections items which the Bank had not as yet collected. The last paragraph of the order repeated the requirement that the security be first liquidated by the provision that the Bank should be entitled to dividends "when the remainder of the security held by said claimant has been liquidated and the proceeds applied upon the unpaid balance of said claim." It is thus apparent that the exact amount of the Bank's unsecured claim could not be determined until all of the security was liquidated; in fact, there was even a possibility that the proceeds from the sale of the securities would have been sufficient to pay its claim in full. Such an order is interlocutory and this Court has so held in *Robinson v. Edler* (9th Cir., 1935), 78 F. 2d 817, 29 A. B. R. (N. S.) 502, which involved an order on a claim requiring the liquidation of securities very similar to that here involved.

The banker's lien order, being interlocutory, in order to have been appealable, must have arisen in a proceeding in bankruptcy as distinguished from a controversy arising in proceedings in bankruptcy, as those terms are used in Section 24 of the Bankruptcy Act. *Petersen v. Sampsell* (1948, 9th Cir.), 170 F. 2d 555; *In re Christ's Church of the Golden Rule* (1949, 9th Cir.), 172 F. 2d 523. The banker's lien appeal involved the Bank's right to apply against its claim the proceeds from the commercial paper upon which it asserted a banker's lien. That this is a proceeding necessarily follows from cases such as *McDaniel National Bank v. Bridwell* (1932, 8th Cir.), 74 F. 2d 311, 26 A. B. R. (N. S.) 748, in which the Court of Appeals for the 8th Circuit held that an order determining a bank-claimant's right to set off against its claim the balance in the bankrupt's account with the bank was a proceeding and not a controversy.

It is settled that the taking of an appeal from an interlocutory order in a proceeding in bankruptcy does not divest the bankruptcy court of jurisdiction to take further action in the matter. Thus, in *Matter of Woodruff* (1941, 9th Cir.), 121 F. 2d 152, 46 A. B. R. (N. S.) 567, this Court ruled that the bankruptcy court had jurisdiction to hear and determine the account and petition for compensation of the receiver and his attorneys, notwithstanding the fact that there was then pending in this Court an appeal from an earlier order of the bankruptcy court in the same proceeding, directing the receiver and his attorneys to petition for compensation and fees. This Court stated:

> "Appellant contends that the California court had no jurisdiction to make the order of June 27, 1940, because, at that time, our mandate in *Jackson v.*

> *Lynch, supra,* decided May 10, 1940, had not been issued. There is no merit in this contention. The orders reviewed in *Jackson v. Lynch, supra,* were not final judgments or decrees, but were interlocutory orders only. Consequently, the appeal therefrom did not remove the entire case to this court or preclude further proceedings in the court below. *Foote v. Parsons Non-Skid Co.* (C. C. A., 6th Cir.), 196 Fed. 951, 953. See also, *In Re F. P. Newport Corp.* (C. C. A., 9th Cir.), 37 A. B. R. (N. S.) 470, 475, 98 F. (2d) 453, 456. Much less were such proceedings precluded by a mere stay of mandate."

See also *Fernow v. Liberty Royalties Corp.* (1944, 10th Cir.), 146 F. 2d 396, 57 A. B. R. (N. S.) 659.

Bankruptcy proceedings are *sui generis* and cannot be compared to the ordinary type of civil litigation. As has already been indicated herein, Section 57(k) of the Act provides a clear recognition of the fact that judgments and orders in bankruptcy do not have the same finality as they have in the ordinary type of litigation. It is settled that the ordinary time limitations imposed by Federal Rules 59 and 60 pertaining to new trials and relief from judgments and orders do not apply to bankruptcy. See in this connection *Indemnity Insurance Co. v. Reisley* (2d Cir., 1946), 153 F. 2d 296, and the cases there cited as holding that orders in bankruptcy may be reconsidered at any time while the bankruptcy proceedings remain open.

See also:

Bailey v. Proctor (1st Cir., 1948), 166 F. 2d 392.

It is for this reason that non-bankruptcy cases such as *Rothschild & Co. v. Marshall* (9th Cir., 1931), 51 F. 2d 897, which was cited by this Court in its opinion, cannot be controlling in bankruptcy cases.

We respectfully submit that the foregoing principles as applied in the instant case would compel a holding that the pending banker's lien appeal did not divest the bankruptcy court of jurisdiction to entertain, hear and determine the receiver's petition to subordinate the claim of the Bank.

IV.

If the Banker's Lien Appeal Is Deemed to Have Divested the Bankruptcy Court of Jurisdiction to Act on a Petition for Subordination, This Court Should, by Its Mandate, Direct the Bankruptcy Court to Hear and Determine the Receiver's Amended Petition.

For the reasons hereinabove stated, we contend that the ruling of this Court that the banker's lien order determined the subordination question was erroneous. In any event, the language of this Court's opinion as it now stands, is ambiguous and should be clarified. This Court stated:

> "We are persuaded that the last paragraph of said order decided the question of priority of the Bank's claim and the appeal took with it jurisdiction of the referee to act on that question."

It is not clear whether or not the quoted sentence meant that the issue as to subordination was *res judicata* and, therefore, could never be reconsidered by the bankruptcy court or whether this Court meant merely that the bankruptcy court could not reconsider the ruling while the other appeal was pending. It would seem from a reading of this Court's entire opinion that the latter interpretation is correct for otherwise, there would have been no need for this Court to determine in appellant's favor all of the other issues involved on the appeal. Moreover, if the bank-

ruptcy court is without power to determine the receiver's petition upon the receipt of the mandate from this Court, Section 57(k) of the Bankruptcy Act will have been emasculated.

For this reason, if this Court adheres to its ruling as set forth in its opinion, the mandate should clearly set forth that the ruling does not preclude the bankruptcy court from hearing and determining the petition for subordination when the mandate comes back.

One of the cases cited by the Court suggests this procedure. In *Rogers v. Consolidated Rock Products Co.* (9th Cir., 1940), 114 F. 2d 108, 44 A. B. R. (N. S.) 59, the Court held that the bankruptcy court was without authority to consider a proposal for changes and modifications in a confirmed plan of reorganization by reason of the fact that at the time the proposal was made, there was an appeal pending in this Court from the order confirming the plan of reorganization. After stating that the trial court was without jurisdiction to proceed further with the matter pertaining to the plan of reorganization until it received the mandate of this Court, the Court went on to say:

> "If a decree is entered pursuant to the mandate of an Appellate Court, proper deference to its authority requires that a proceeding to reopen it, whether by rehearing or review, should first be referred to that tribunal."

Accordingly, request is hereby made, on behalf of the appellant, that this Court direct the bankruptcy court to treat the petition for subordination as a petition for reconsideration which it should proceed to hear and determine. The Court of Appeals for the First Circuit has

recently had occasion to express itself with respect to a procedure such as that here suggested. In *Bailey v. Proctor* (1948, 1st Cir.), 166 F. 2d 392, the question for decision was whether or not a reorganization court in bankruptcy had authority to hear and consider a petition to supplement or modify an earlier judgment rendered by the Court refusing to confirm a proposed plan of reorganization and ordering an immediate liquidation of the assets of the debtor. The earlier judgment had been appealed to the Court of Appeals for the First Circuit which had affirmed the ruling and the Supreme Court denied certiorari. After the mandate of the Court of Appeals came down a petition was filed in the bankruptcy court to supplement or modify the earlier order and it was denied. Thereupon, the proponents of the modification appealed to the Court of Appeals. On that appeal one of the contentions made in support of the ruling of the trial court was that the earlier ruling having been the subject of an appeal and having been affirmed, the reorganization court did not have the power to reconsider any question pertaining to the plan. The Court found it unnecessary to decide that question despite indications in its opinion that there was such power, at least upon the filing of the Circuit Court's mandate with the trial court. However, the Court went on to point out, as was suggested by this Court, in the case of *Rogers v. Consolidated Rock Products Co., supra* (166 F. 2d at 396):

> "We are inclined to think that the proper course of action would have been for the appellant to petition us for leave to file the new plan with the District Court for its consideration, if they felt the circumstances had so changed as to require a modification of that order."

Although this procedure had not been followed, the Court, nevertheless, regarded the argument on appeal as in effect a petition to that Court, for leave to file a new plan with the District Court and went on not only to grant that leave, but to proceed to hear and determine the proposed new plan on its merits, stating (166 F. 2d at 397):

> "We shall consider that point, treating the appellant's prayer in this case as equivalent to a petition for leave to have the District Judge consider the question and granting the petition *nunc pro tunc*. Thus, we shall finally dispose of the case here of which the District Judge has power in the first instance."

The Court thereupon approved the new proposed plan and directed the reorganization court to confirm it.

Bailey v. Proctor involved still another point. The contention was made that it was too late to seek a reconsideration of the earlier order and that therefore the "petition" was not timely. The Court answered this argument as follows (166 F. 2d at 397):

> "The receivers also urge as an objection to granting the order the lateness of the proposal. They claim that the proposed plan should have been put forth at the time the various other plans were considered. Doubtless, the reason the appellants did not do so was that, upon advice of counsel, they thought at the earlier stage that the district court did not have power to order the payment of the debentures and the liquidation of the trust; and hence at that time it did not occur to them to propose the plan now in question, which contemplates continuance of the trust in the hands of those shareholders who choose not to withdraw, with all outstanding debentures paid off in full. Appellants proved to be mistaken in the legal

position they argued on the earlier appeal but their arguments were not unsubstantial or frivolous. There is a public interest in terminating the receivership as soon as may reasonably be done and in not allowing previous orders to be reopened continually. But since no one will be prejudiced by the modification of the liquidation order, as proposed, we do not think the plan should be rejected merely because of the delay due to the earlier appeal by these appellants on questions of law which were fairly litigable. As was said by L. Hand, J.: '* * * there can be considerations more imperative than the despatch of judicial business, even after delays * * *. If the legally protected interests of any opposing parties are fully preserved, it is not a good reason to deny others any reasonable chance to protect their own interests that they have been long in asserting them.' *Knight v. Wertheim & Co.,* 2 Cir., 1946, 158 F. 2d 838, 844 certiorari denied sum nom. *McGuire v. Equitable Office Building Corporation,* 1947, 331 U. S. 818, 67 S. Ct. 1307, 1308."

Such reasoning would determine any contention in the instant case that delay somehow precludes the granting of the relief requested.

There are other obvious answers in the instant case to any contentions that might be made by the Bank as to delay. In the first place, as pointed out by this Court in its opinion, the petition for subordination was filed by the receiver on July 30, 1948, the same day that the referee confirmed the plan of arrangement. At all times since that date the receiver has been pressing that petition and the Bank has not only been fully aware of his contention but has vigorously resisted it.

The ruling of this Court that the receiver's petition stated a cause of action and that the bankruptcy court (but for the appeal from the banker's lien order) had jurisdiction to hear and determine it will be reduced to the status of mere advisory opinions unless this Court makes it clear that the receiver is not foreclosed from proceeding upon his petition for subordination when the mandate of this Court is filed with the bankruptcy court. The receiver has alleged that all of the unpaid creditors of the debtor were misled and injured by the conduct of the Bank; equity and fairness, as well as Section (57k) of the Bankruptcy Act, require that the bankruptcy court determine those allegations.

Conclusion.

The bankruptcy court is a court of equity having broad equitable powers that endure so long as a bankruptcy estate remains open. The present estate is open. We respectfully contend for the reasons and upon the authorities hereinabove mentioned that the subordination issues could not have been determined in the banker's lien proceedings and that this Court's contrary ruling is erroneous. However, if this Court adheres to the position originally announced, the receiver hereby requests on behalf of the unpaid creditors in the within proceedings that this Honorable Court treat the appeal herein and this petition for rehearing as a petition seeking reconsideration of the Bank's claim under Section 57k of the Bankruptcy Act and that this Court direct the bankruptcy court to hear and determine the amended petition for subordination. As was pointed out in our original briefs, the receiver's amended petition was based upon facts obtained through further investigation and use of the dis-